



1410-72-P

**LIBRARY OF CONGRESS**

**Copyright Royalty Board**

**37 CFR Part 370**

**[Docket No. 20-CRB-0007-RM]**

**Regulation Concerning Proxy Distributions for Unmatched Royalties Deposited During 2010-2018**

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Proposed rule.

**SUMMARY:** The Copyright Royalty Judges are proposing to amend their regulations concerning proxy distributions for unmatched royalties deposited pursuant to statutory license for the period 2010 through 2018.

**DATES:** Comments are due no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

**ADDRESSES:** You may submit comments and proposals, identified by docket number 20-CRB-0007-RM, online via eCRB, the Copyright Royalty Board's online electronic filing application, at <https://app.crb.gov/>.

**Instructions:** All submissions must include a reference to the CRB and this docket number. All submissions will be posted without change to eCRB at <https://app.crb.gov/> including any personal information provided.

**Docket:** For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/>, and search for docket number 20-CRB-0007-RM.

**FOR FURTHER INFORMATION CONTACT:** Anita Blaine, CRB Program

Specialist, by telephone at (202) 707-7658 or e-mail at [crb@loc.gov](mailto:crb@loc.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Copyright Act grants copyright owners of sound recordings the exclusive right to perform their works publicly by means of digital audio transmissions subject to certain limitations and exceptions. Among the limitations placed on the performance right for sound recordings is a statutory license that permits certain eligible subscription, nonsubscription, satellite digital audio radio services, and business establishment services to perform those sound recordings publicly by means of digital audio transmissions. 17 U.S.C. 114.

Similarly, copyright owners of sound recordings are granted the exclusive right to make copies of their works subject to certain limitations and exceptions. Among the limitations placed on the reproduction right for sound recordings is a statutory license that permits certain eligible subscription, nonsubscription, satellite digital audio radio services, and business establishment services to make ephemeral copies of those sound recordings to facilitate their digital transmission. 17 U.S.C. 112(e).

Both the section 114 and 112 licenses require services to, among other things, pay royalty fees and to report to copyright owners of sound recordings on the use of their works. Both licenses direct the Copyright Royalty Judges (“Judges”) to determine the royalty rates to be paid, 17 U.S.C. 114(f)(1)(A), (f)(2)(A) and 17 U.S.C. 112(e)(3), and to establish regulations to give copyright owners reasonable notice of the use of their works and create and maintain records of use for delivery to copyright owners. 17 U.S.C.

114(f)(4)(A) and 17 U.S.C. 112(e)(4). The royalty fees collected under the section 114 and 112 licenses, as determined by the Judges, are paid to a central source known as a Collective.<sup>1</sup> 37 CFR 380.2(a). The purpose of the notice and recordkeeping requirement is to ensure that the royalties collected under the statutory licenses are distributed to the correct recipients.

On March 24, 2011, SoundExchange petitioned the Judges to commence a rulemaking proceeding to consider adopting regulations to authorize SoundExchange, when a licensee fails to provide usable reports of use, to use reporting data from certain other licensees (proxy reporting data) as a basis for distributing sound recording royalties deposited by that licensee during the period prior to 2010 to copyright owners and performers. Petition of SoundExchange, Inc. for a Rulemaking to Authorize Use of a Proxy to Distribute Certain Pre-2010 Sound Recording Royalties at 1-2 and n.1, Docket No. RM 2011-5 (March 24, 2011). After notice and comment, the Judges adopted SoundExchange's proposal to use proxy reporting data to permit distribution of royalties collected for the period April 1, 2004, through December 31, 2009, for the public performance of sound recordings by means of digital audio transmissions pursuant to statutory license for those services for which no reports of use were submitted or for which the reports of use were unusable. 76 FR 45695 (Aug. 1, 2011).<sup>2</sup>

On November 20, 2018, SoundExchange requested that the Judges amend the Judges' regulations to authorize SoundExchange to continue to use proxy reporting data to distribute to copyright owners and performers certain sound recording royalties

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<sup>1</sup> SoundExchange, Inc., has been the Collective since the inception of the two licenses.

<sup>2</sup> The Copyright Office approved a similar proposal in 2004 covering the 1998 to 2004 period. 69 FR 58261 (Sept. 30, 2004).

collected by SoundExchange for periods before January 1, 2019, that are otherwise undistributable due to licensees' failure to provide reports of use or their provision of reports of use that are so deficient as to be unusable. Letter from Steven R. Englund, Counsel for SoundExchange, Inc., Docket No. 14-CRB-0005 (RM) (SoundExchange Letter I).<sup>3</sup> SoundExchange stated that it was holding \$24 million in royalties for the period 2010 through 2016 and additional royalties for 2017 that are undistributable due to missing or unusable reports of use. SoundExchange Letter I at 1 & n.1.

SoundExchange renewed its request on April 23, 2020. SoundExchange Letter II. In that letter, SoundExchange stated it was holding approximately \$32 million in statutory royalties for the period 2010 through 2018 and requested that the Judges authorize SoundExchange to distribute these royalties using the same "annual/license type methodology" that the Judges approved in 2011. SoundExchange Letter II at 2, citing 37 CFR 370.3(i), 370.4(f). SoundExchange requested that the Judges change the dates in the current applicable regulations from 2010 to 2019, which would authorize SoundExchange to distribute royalties from the period 2010 through 2018 by using proxy reports of use. SoundExchange Letter II at 2-3.

In light of SoundExchange's requests, the Judges propose to authorize SoundExchange to continue to use the proxy distribution methodologies in 37 CFR 370.3(i), and 370.4(f) to distribute royalties for the period 2010 through 2018. Although

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<sup>3</sup> SoundExchange submitted its letter further to Docket No. 14-CRB-0005 RM, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, which is still pending with the Judges. The 2014 petition included, among other proposals, a provision that would authorize SoundExchange to distribute royalties that did not have a useable, matching report of use by a proxy methodology that SoundExchange would develop in its discretion, on an ongoing basis. Letter from Steven R. Englund, Counsel for SoundExchange, Inc. (SoundExchange Letter II) at 2.

the current regulations use the mandatory “shall,” the Judges propose to use the permissive “may” to authorize such distributions.

### **Solicitation of Comments on the Proposed Regulations**

The Judges seek comment from interested parties on the Judges’ proposal to permit SoundExchange to use a proxy for the distribution of royalties collected under the section 114 and 112 licenses for the period 2010 through 2018. In addition to general comments regarding the proposal, the Judges seek comments on the following areas:

1. SoundExchange has requested that the Judges extend the current regulations that require rather than permit SoundExchange to use a proxy distribution methodology for allocating royalties that SoundExchange cannot match with a report of use. The regulations that the Judges propose would permit but not require SoundExchange to use such a proxy methodology. The Judges seek comment on the propriety of the proposed change regarding SoundExchange’s ability to distribute unmatched royalties.
2. Has SoundExchange exhausted all reasonable means to ensure that all undistributed royalties for the period from 2010 through 2018, have been distributed to the party that earned those royalties? If not, what other means could SoundExchange use to facilitate further distributions without resorting to proxy reports of use?
3. Assuming that SoundExchange has exhausted all reasonable means of distributing royalties to the parties who earned them, is the proposed use of proxy reports a fair and appropriate means of distributing remaining royalties for this period? If not, what would be a better alternative?

### **List of Subjects in 37 CFR Part 370**

Copyright, Sound recordings.

### **Proposed Regulations**

For the reasons set forth in the preamble, and under the authority of chapter 8, title 17, United States Code, the Copyright Royalty Judges propose to amend part 370 of Title 37 of the Code of Federal Regulations as follows:

**PART 370 – NOTICE AND RECORDKEEPING REQUIREMENTS FOR  
STATUTORY LICENSES**

1. The authority citation for part 370 is revised to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 803(b)(6)(A).

2. Amend § 370.3 by revising paragraph (i) to read as follows:

**§ 370.3 Reports of use of sound recordings under statutory license for preexisting  
subscription services.**

\* \* \* \* \*

(i) In any case in which a preexisting subscription service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2019, reports of use for the corresponding calendar year filed by other preexisting subscription services may serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

3. Amend § 370.4 by revising paragraph (f) to read as follows:

**§ 370.4 Reports of use of sound recordings under statutory license for  
nonsubscription transmission services, preexisting satellite digital audio radio  
services, new subscription services and business establishment services.**

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(f) In any case in which a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service, or business establishment service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2019, reports of use for the corresponding calendar year filed by other services of the same type may serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

Dated: May 18, 2020

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Jesse M. Feder,  
Chief U.S. Copyright Royalty Judge.  
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